Supreme Court, U.S.
FILED
FEB 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-968 (3)

IN THE

Supreme Court Of The United States

October Term, 1986

GENEVA COUNTY BOARD OF EDUCATION,
Petitioner,

v.

MARYANN H. HIDLE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

DONALD B. SWEENEY, JR.
RIVES & PETERSON
1700 Financial Center
Birmingham, Alabama 35203
(205) 328-8141
Counsel of Record

JOSEPH P. HUGHES
HUGHES & DANNER
P.O. Box 10
Geneva, Alabama 36340
Of Counsel

16 pp

ARGUMENT ADDRESSED TO ISSUES RAISED BY RESPONDENT

(1) The Eleventh Circuit has devised a means of evading Rule 52(a) Fed. R. Civ. P. by purporting to decide a case on grounds of "policy".

(2) The Eleventh Circuit's decision conflicts with logic, with Rule 59(e) Fed. R. Civ. P. and with decisions of the Fourth Circuit.

(3) The Eleventh Circuit's decision conflicts with Title VII of the Civil Rights Act.

(4) The Eleventh Circuit's decision conflicts with decisions of the United States Supreme Court and prior decisions of the Eleventh Circuit.

(5) The Eleventh Circuit's reversal and award of back pay is unsupported by the record and unsubstantiated by the District Judge's findings.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT ADDRESSED TO ISSUES RAISED BY RESPONDENT 1

(1) The Eleventh Circuit Has Devised A Means Of Evading Rule 52 (a) Fed. R. Civ. P. By Purporting To Decide A Case On Grounds Of "Policy". 2

(2) The Eleventh Circuit's Decision Conflicts With Logic, With Rule 59 (e) Fed. R. Civ. P. And With Decisions Of The Fourth Circuit. 3

(3) The Eleventh Circuit's Decision Conflicts With Title VII Of The Civil Rights Act. 5

(4) The Eleventh Circuit's Decision Conflicts With Decisions Of The United States Supreme Court And Prior Decisions Of The Eleventh Circuit. 6

(5) The Eleventh Circuit's Reversal And Award Of Back Pay Is Unsupported By The Record And Unsubstantiated By The District Judge's Findings. 7

CONCLUSION 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Cases: *Page*

Lee v. Russell County Bd. of Educ., 684 F.2d 769 (11th Cir. 1982) 6

Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984) 6, 7

Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977) 6, 7

Pullman-Standard v. Swint, 456 U.S. 273 (1983) 2

United States v. Hollis, 424 F.2d 188 (4th Cir. 1970) 4

United States v. Jacobs, 298 F.2d 469 (4th Cir. 1961) 4

Statutes:

42 U.S.C. § 2000e-5 (g) 5

Rules:

Rule 59 Fed. R. Civ. P. 3, 5

Rule 52 Fed. R. Civ. P. 2, 3

No. 86-968

IN THE

Supreme Court Of The United States

October Term, 1986

GENEVA COUNTY BOARD OF EDUCATION,
Petitioner,

v.

MARYANN H. HIDLE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

ARGUMENT ADDRESSED TO ISSUES RAISED BY RESPONDENT

Petitioner respectfully submits this reply brief to clarify factual and legal contentions which arise from Respondent's brief in opposition to Petitioner's request for a writ of certiorari. In reply, Respondent attempts to slough over and minimize issues in order to divert the Court's attention from the Eleventh Circuit's flagrant deviation from established legal principles. The following summary highlights the importance of the issues which are at the heart of Petitioner's request for review.

(1) The Eleventh Circuit Has Devised A Means Of Evading Rule 52(a) Fed. R. Civ. P. By Purporting To Decide A Case On Grounds Of "Policy".

The Eleventh Circuit has circumvented the clearly erroneous standard mandated by Rule 52(a) Fed. R. Civ. P. by purporting to reverse this case on grounds of "policy", and by confining its holding to the unique result of this case. If appellate courts were given the license to look to the result of a case, and reverse because of what they perceived to be unfairness to a particular party, appellate review would be unpredictable and anarchic. It is respectfully submitted that Rule 52(a) circumscribes appellate power by stipulating that findings of fact are to be reversed only if clearly erroneous. If, however, "findings are infirm because of an erroneous view of the law", the Court of Appeals must remand the case for the application of the correct legal principle. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-293 (1983).

These rules place certain duties on a Court of Appeals: (1) to review the facts (2) to establish the applicable law. If the Court of Appeals had reviewed the facts, or had pronounced the controlling legal principle it would have found itself subject to the strictures of Fed. R. Civ. P. 52(a). Since it could not find that the facts were clearly erroneous, the Eleventh Circuit expressly declined to pronounce on the facts in its opinion. (App. A-21)[1] Nor could the Court of Appeals find that Rule 59(e) had been misapplied. Therefore the Court avoided its duty to rule that the District Court had the power to correct its erroneous judgment as it did under Fed. R. Civ. P. 59(e). Instead "assuming the District Court has such power", the appellate court concluded that in this particular case it abused its discretion. (App. A-23).

Respondent argues, but cites no authority for the proposition that Rule 52(a) does not apply to a determination that the

---

[1]References to Respondent's Brief are denoted as "H-___"; to Petitioner's Brief as "A-___"; to the transcript as "Tr. ___", and to the Record as "R-___".

District Court abused its discretion. (H-15) If appellate courts could reverse on the basis of "abuse of discretion" without reviewing the facts or the underlying law, the effect of Rule 52(a) could be nugatory. While Petitioner concedes the important policy considerations underlying the necessity for finality of judgments, such policy does not apply to a case such as this, where Hidle herself had opened up the judgment by her motion and interrupted its finality.

Petitioner earnestly requests that the Supreme Court grant certiorari to halt the Eleventh Circuit's use of its new-found device to enable it to overstep its role by reversing factual determinations of the District Court on grounds of "policy".

(2) The Eleventh Circuit's Decision Conflicts With Logic, With Rule 59(e) Fed. R. Civ. P. And With Decisions Of The Fourth Circuit.

A careful reading of the Eleventh Circuit's opinion in this case reveals that although the Court of Appeals stated that it would not rule on the power of the District Court to correct errors in a judgment following a Rule 59(e) post-judgment motion, in fact the Eleventh Circuit's decision was based entirely on this rule. The appellate court's expressed concern was that when Hidle asked the Court to amend the judgment, "she lost her judgment to the defendant who had not asked any post-judgment relief." The Court reasoned that the error correcting function of a Rule 59(e) motion would be inhibited if a successful party could not ask for correction without putting its judgment at risk, and if a defendant "successful on five claims cannot safely seek for correction concerning claim six." (App. A-23).

It is obvious that the Eleventh Circuit's holding was that a District Court may not alter or amend a judgment pursuant to Rule 59(e) to benefit a non-moving party and to the detriment of the moving party. In effect then, the Eleventh Circuit's rule is that if the movant is the successful party, the judgment may not be amended to the detriment of that successful party. Yet

the success of Hidle, the movant, was predicated on a mistake of law. Is the Court then restricted to address only Hidle's remedies (although flowing from a legally erroneous decision) and leave the substantive legal error uncorrected?

This holding is illogical and directly conflicts with the two Fourth Circuit cases cited by the Board: *United States v. Hollis,* 424 F.2d 188 (4th Cir. 1970) and *United States v. Jacobs,* 298 F.2d 469 (4th Cir. 1961).

In *Hollis, supra,* a ship repairer's employee brought suit against the United States for injuries sustained in a naval vessel, and the United States sought indemnity from the ship repairer. In his first order the District Judge found that the Navy was negligent and awarded damages against the United States, but found no negligence on the part of the plaintiff or the ship repairer. The plaintiff submitted a post-trial motion seeking an amendment of the order with respect to damages, or a new trial on the issue. The Court then amended its order with regard to damages but *also found the plaintiff guilty of contributory negligence.*

Clearly, this case is on all fours with the case at bar. As in Hidle's case, it was the plaintiff who filed the motion seeking an amendment with respect to damages and in both cases the District Judge amended his findings with respect to liability *to the detriment of the successful moving party.*

In *Jacobs, supra,* the District Court's order had required one of the parties to deposit a check with the clerk of the court which was to be paid to the opposing party on the performance of certain duties by that opposing party. Both parties filed post-judgment motions seeking modifications of the order. Subsequently an intervenor was allowed into the suit and it filed a motion seeking payment out of the funds held by the court. The court then amended its original order, *inter alia* granting judgment to the intervenor. Although the court's modification favored the intervenor, and was detrimental to the original parties, the Fourth Circuit held that once the matter had been opened up by motions, the court had the power to enter such order as was required in the interest of justice.

Both Hidle and the Eleventh Circuit confuse the operation of Rule 59(e) with the power of a district court to act *sua sponte* to amend a judgment within 10 days after the judgment was entered if neither party files a motion. Rule 59(d) Fed. R. Civ. P. Obviously, Rule 59(d) is inappropriate when a motion has been filed. In the case at bar, judgment was entered on July 2, 1984, a motion timely filed on July 11, 1984 and the motions were heard on August 28, 1984. It would be entirely illogical if the Court's ability to amend the judgment to the detriment of Hidle had expired on July 12, 1984, *prior to the hearing,* while the Court retained jurisdiction to amend the judgment in any other respect until it ruled after the hearing. Obviously, Rule 59(d) applies to cases in which no motion has been filed and the Court acts *sua sponte,* while Rule 59(e) empowers a court to retain jurisdiction to correct all errors after a motion has been filed and the case has been opened for consideration.

(3) The Eleventh Circuit's Decision Conflicts With Title VII Of The Civil Rights Act.

The Eleventh Circuit has contravened the clear wording of a federal statute by ordering reinstatement, damages and injunctive relief without inquiring whether Hidle was refused employment for any reason other than sex discrimination. The statute states:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, *if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 2000e-3(a) of this title.* (Emphasis added).

42 U.S.C. § 2000e-5(g).

(4) The Eleventh Circuit's Decision Conflicts With Decisions Of The United States Supreme Court And Prior Decisions Of The Eleventh Circuit.

By determining liability and awarding damages to Hidle without inquiring whether the Board would have made the same employment decision absent the discriminatory conduct, the Eleventh Circuit has ignored this Court's holding in *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274 (1977), and prior decisions of the Eleventh Circuit.

In the Eleventh Circuit, the *Mt. Healthy* inquiry presents a complete defense in a Title VII case. For instance, the Eleventh Circuit has ruled that "[W]hen a significant unconstitutional motive is ultimately proved, by either circumstantial or direct evidence, the defendants' only form of rebuttal is under *Mt. Healthy.*" *Lee v. Russell County Bd. of Educ.,* 684 F.2d 769, 774 (11th Cir. 1982). Furthermore, once discrimination has been proven in a Title VII case, whether by circumstantial or direct evidence, a presumption of entitlement to appropriate remedies arises which can be rebutted by applying the *Mt. Healthy* test. In *Lewis v. Smith,* 731 F.2d 1535, 1538 (11th Cir. 1984), the Court explained that once discrimination is proven, "[T]he burden then shifts to the employer to rebut the presumption by showing that the discriminatee would not have been hired absent the discrimination."

Respondent argues that the current case does not involve "mixed motives". Respondent states that a mixed motive case "is one in which the district court credits the defendant's articulated reasons, but also finds that sex or race discrimination played a role in the employment decision at issue. It is impossible to have a 'mixed motive' case when, as here, the defendant's articulated motivation has been rejected as pretextual and unworthy of credence." (H-13).

Respondent is incorrect. At no stage in the proceedings did any court reject the Board's reasons as pretextual or unworthy of credence. On the contrary, the District Courts' opinions reveal the many credible reasons which the Board presented to

the Court, and which the Court found had justified the Board's selection of Lee: that Hidle had resigned her job to move to Florida in a move she described as essential for her family life (App. A-3, 5); Hidle's lack of experience in administration and supervision (App. A-6) and reservations about Hidle's ability to lead (App. A-7). In contrast, the Court found that Lee had considerable teaching experience in the Army (App. A-4); he was immediately available (App. A-4); he had outstanding recommendations and had demonstrated excellent leadership performance on the job (App. A-8); he was punctual and dependable (App. A-8). If as Respondent alleges, the Court had discredited the Board's reasons, the Court would not have found this case to be a "close case" and would not have concluded that Hidle's case was "not at all overwhelming" (App. A-10). The many credible reasons presented by the Board and accepted by the District Court indicate that this case is, like *Mt. Healthy,* one in which an employer acts pursuant to "mixed motives".

There is no basis for Respondent's theory that the District Judge applied the *Mt. Healthy* test as a subterfuge to justify his denial of an award to Hidle (H-15). Such an accusation flies in the face of the record and credibility of a Federal Judge. First, as has been pointed out above, in the Eleventh Circuit a finding of discrimination raises only a presumption of entitlement to remedies. *Lewis v. Smith, supra.* The District Judge was not compelled to resort to a subterfuge to alter his findings on liability because no damage had been proven: he could have found liability but that the evidence rebutted the inference to remedies.

(5) The Eleventh Circuit's Reversal And Award Of Back Pay Is Unsupported By The Record And Unsubstantiated By The District Judge's Findings.

This case has the unusual feature in that the Eleventh Circuit has awarded back-pay which is neither supported by the record nor the trial judge's findings but based on a *post-judgment motion.* (App. A-24)

The pretrial order had required Hidle to file a statement of agreed and disputed facts in support of "her claim as to liability and damages". (R. 127) No less than 202 assertions of fact were proposed by Hidle and agreed to by the Board. (R. 131-154) Not one of Hidle's proposed facts related to back-pay, salary or monetary damages, although the agreed facts would have been an ideal vehicle for establishing such entitlement. Nonetheless, in rendering his original opinion, the District Judge addressed the question of damages and found that Hidle had failed to establish financial loss. The District Judge addressed the damages issue on two subsequent occasions: at the post-trial hearing and after the appeal. On each occasion he found no basis for an award of back-pay, finding it anomalous that a tenured teacher, who *voluntarily* broke her contract at mid-term, gave up a tenured position and moved to Florida, should be entitled to claim damages from the school system which she had abandoned during the school year.

Finally, the Board wishes to correct certain facts which Hidle has presented to the Court in an effort to distort the record:

(a) Respondent says that it was a stipulated fact in the case that "the defendant's decision-maker, Mike Whittaker, admitted that he preferred to have a man rather than a woman in the position of Assistant Principal at the Hartford School. Agreed Fact #34" (H-4). This statement constitutes a distortion of the record and is misleading in two respects. First, the District Judge found that Whittaker made the recommendation but it was the Superintendent and the Board who employed Lee and thus were the decisionmakers. (App. A-4). Second, it is important for the Court to be aware that Whittaker's statement was qualified by the following additional sentence: "Mike Whittaker preferred Lee, who was a man, as opposed to Hidle who was a woman." (R. 136) Moreover, in commenting on this statement the trial judge found that it was weakened by Whittaker's later explanation that he needed a disciplinarian such as he knew Lee to be. (App. A-8)

(b) This case centers on a vacancy which occurred at the Hartford School. Respondent's reference to events which oc-

curred at the Samson School are misleading since the trial judge ruled that evidence concerning Samson School was inadmissible because the Samson vacancy had occurred subsequent to that at Hartford School. (Tr. 16) Respondent's references to the vacancy at Coffee Springs School are also due to be discounted because the trial judge did not find any discriminatory practice by that school against Hidle.

(c) Respondent endeavors to establish that Hidle was better qualified for the job of Assistant Principal than Lee. However, the Court found that the requirement of a Master's Degree in Administration and Supervision would only be enforced if the school did not comply within one year of a warning. Lee was already working on that degree at the time of his selection and obtained it nine months after his selection. (App. A-5, 6) The dilemma facing every employer is to assess the academic qualifications, recommendations, past experience, character and personality of the applicants for a job, and to try to project those criteria into the position which is to be filled. In this case the Board had first-hand knowledge that Lee would do an excellent job since he had already proven himself. He had established his authority over the students and teachers and was functioning *de facto* as an Assistant Principal. It would hardly have been reasonable for the Board to displace a proven administrator and train a new Assistant Principal whose performance in that position may or may not have been adequate.

CONCLUSION

The Eleventh Circuit's decision conflicts with established and important legal principles. Petitioner respectfully submits that the issues raised by this petition merit review and that a Writ of Certiorari should be granted.

Respectfully submitted,

Donald B. Sweeney, Jr.
Counsel of Record

Rives & Peterson
1700 Financial Center
Birmingham, Alabama 35203

Telephone: 205-328-8141

Joseph P. Hughes
Of Counsel

Hughes & Danner
P.O. Box 10
Geneva, Alabama 36340

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Reply Brief of Petitioner on each counsel for Respondent, namely: Robert L. Wiggins, Jr., Esq., 15th Floor, Colonial Bank Building, Birmingham, Alabama, 35203; and Coleman Hamm, Esq., 9636 Parkway East, Birmingham, Alabama, 35215, by deposit in United States Mail box, first class, postage prepaid and correctly addressed, this the 10th day of February, 1987. All parties required to be served have been served.

Donald B. Sweeney, Jr.